SPECIFIC CLAIMS AND THE SPECIFIC CLAIMS TRIBUNAL ACT:

FIVE YEARS LATER

A PRESENTATION BY THE ALGONQUIN NATION SECRETARIAT

ON BEHALF OF THE FIRST NATIONS OF

TIMISKAMING, WOLF LAKE, BARRIERE LAKE & EAGLE VILLAGE

March 10 2015

This brief is being submitted on behalf of the four Algonquin First Nations of Timiskaming, Wolf Lake, Barriere Lake and Eagle Village. Our communities are directly affected by the SCTA and the Specific Claims policy, which is why we are making this presentation.

The Specific Claims Tribunal Act (SCTA) came into force on October 16, 2008. Section 41(1) of the Act states:

> Within one year after the fifth anniversary of the coming into force of this Act, the Minister shall undertake a review of the mandate and structure of the Tribunal, of its efficiency and effectiveness of operation and of any other matters related to this Act that the Minister considers appropriate. In carrying out this review the Minister shall give First Nations an opportunity to make representations.

It is unfortunate that in using his discretion to frame out the terms of the five year review, the Minister has chosen to narrow the scope in such a way that fundamental issues affecting the operation of the Tribunal would seem to remain unaddressed. We are pleased that the Assembly of First Nations has supported a broader discussion allowing for full consideration of the issues that impact upon the Tribunal's operations.

Background

We are all members of the Algonquin nation, whose territory straddles the Ottawa River and includes lands and waters in what is now Ontario and Quebec. (See attachment #1: map showing First Nations communities in the Ottawa River watershed.) We are parties to a series of treaties made with the British between 1760 and 1764 which recognized our aboriginal title and rights. Our traditional territories were reserved under the terms of the Royal Proclamation of 1763, and the anti-trespass legislation adopted by the Crown in the years following applied to our territories. We have never signed a land surrender treaty.

In many ways our situation is unique. A lot of our claims have their origins in events, treaties and legislation from the pre-Confederation era. They often involve lands in two provinces which have a long history of being hostile to our land rights; and they are often affected by the peculiarities of Quebec (for instance, the 1851 Lower Canada legislation creating reserves, and the *Star Chrome* decision of the Judicial Council of the Privy Council). Timiskaming has claims which relate to the creation of the reserve in 1851, surveys and boundaries; illegal surrenders; and mismanagement of trust fund monies. Eagle Village and Barriere Lake, who did not receive reserves until the 1960's and 1970's, are affected by the non-provision of reserve lands as well as subsequent administration of their assets. Wolf Lake still has no reserve lands and has claims based on the non-provision of reserve lands.

What is not unique is that our claims arise from actions, or inaction, on the part of the Crown, and ongoing breaches of its duties to our communities and our members.

General Comments.

We note that the AFN has asked for solution based and action oriented input. Perhaps the most important suggestion that we can make along these lines, is that the federal government's attitude and conduct must change if there is to be any meaningful movement towards the resolution of Specific Claims, and proper implementation of the Specific Claims Tribunal Act. Federal conduct and behaviour are the biggest barrier to allowing claims to have a fair hearing and being resolved.

Specific Claims relate to the Crown's lawful obligations - these are legal commitments which are owed based on a firm legal foundation, not Crown goodwill. The original Specific Claims policy was developed by Canada as a way to avoid costly litigation, with the intention of resolving these lawfully-based grievances through negotiations.

Prior to the coming into force of the SCTA in 2008, there were decades of efforts to reform the Specific claims policy and process. The main reason was simple: the government of Canada was in a conflict of interest, since even though these claims were against the federal Crown, it was in a position to judge, fund and control the policy and the process. The same behaviours which led to the claims in the first place, continued to affect the federal Crown's management of these claims.

The SCTA was supposed to displace this conflict of interest by establishing an independent tribunal to rule on validity and compensation. Unfortunately, our experience since 2007 has been that federal conflict of interest is as entrenched as ever, and despite the existence of the Tribunal, there appear to be more barriers to getting a fair hearing, not less. This is a result of decisions made by the federal government since the SCTA came into force. One of the biggest problems we have seen is a pattern of arbitrary decision making and an unwillingness to engage in a meaningful way with respect to the development and management of claims. This federal conduct is prejudicing our ability to have our claims heard.

Moreover, the federal government's priority appears to be to make claims "go away" by rejecting them or making it harder for them to be pursued. This is in direct contrast to the principle of resolving outstanding claims and moving towards reconciliation, which we understood to be the basis of the SCTA and related measures. In this respect, the most productive change that could happen, is for the federal government to amend its behaviour in order to begin resolving claims in a meaningful way, consistent with the honour of the Crown.

Research & Development

ANS communities' claims, as we have explained, are complex and span both sides of Confederation, as well as a provincial border. Recent cuts of 50% to the research and development budget has had a severe impact on our ability to move forward and develop

claims. Under current funding levels, there is not enough to carry out the research and development of claims and also formalize statements of claim for submission to Canada. The funders do not appear prepared to engage in a meaningful discussion of how they expect Claims Research Units to operate under these circumstances. Given the drastic nature of the cuts and their impact on the ability of Claims Research Units to fulfil their mandate, the federal government's apparent unwillingness to engage us on this issue is worrisome.

We understand from a review of the Main Estimates that the federal government intends to reduce funding by 60% for all aspects of Specific Claims (tribunal, SCB, compensation, etc) in the 2016/17 fiscal year. This decision was made without any consultation with the First Nations, and appears to based on the mistaken expectation that incoming claims are coming to an end. This assumption is entirely false. In 2014/15 we did an assessment of our member's potential specific claims. We identified a total of 6 claims that had been rendered inactive due to funding shortfalls, and another 38 new Specific Claims where preliminary research indicated that there was a strong potential basis for a valid claim. Under the federal government's current plans, these claims may never be heard or addressed. The federal government is wrong to suggest publicly that the number of claims is dwindling because it is simply untrue.

Funding needs to be adequate to the tasks at hand. The current plans to reduce funding substantially gives the appearance that Canada is not prepared to resolve claims, but instead wishes to escape from settling up on its lawful obligations.

We are also concerned about increasingly restricted access to federal records, which directly affects our ability to gather the evidence required to document claims. Please refer to attachment #4.

Claims Submissions

Since 2007 we have seen a considerable deterioration in SCB's willingness or ability to engage on claims submissions and validity. This is best illustrated by Timiskaming's experience. Their reserve-related claims are extremely complex. Between 2002 and 2005, at SCB's invitation,we worked towards adopting a common approach to the development and assessment of Timiskaming's Specific Claims. SCB acknowledged that it would need to develop the capacity to assess and address these claims properly.

This led to an agreement on claims development between SCB and the ANS, signed on April 13, 2005. We adjusted our research program and methodology to accommodate this. But in the fall of 2007, SCB informed us that it was abrogating this agreement because, in SCB's view, it was inconsistent with the SCTA Bill. We did not agree but there was no chance to talk: SCB refused to discuss the matter, or to work out mitigating measures. It simply refused to engage. As a result, we lost years of work, while the funders complained that we were not making sufficient progress. Attached please find a copy of the 2005 agreement, as well as a chronology

(attachment #2).

Since 2008, for incoming claims, we find that the Minimum Standard Guidelines have been interpreted very narrowly by SCB. This has resulted in many hours of "busy work" on our part, which has no bearing on resolution of the claims at hand, but take up scarce resources. SCB has been unwilling to engage in a meaningful or cooperative way on this issue.

On the other hand, with respect to its own counter research, SCB appears unwilling or unable to conform to the minimum standard guidelines. In two recent claims submissions we have received documents from SCB that are illegible, without transcripts, with wrong citations, etc. When we have tried to engage SCB on these issues, we receive form letters full of talking points, which appear intended to avoiding meaningful responses to the issues we have raised.

These experiences are indicative of significant change at SCB since the SCTA came into force: instead of working cooperatively and engaging First Nations, SCB has become increasingly remote and unresponsive. SCB appears unwilling or unable to deal in a meaningful way with Claims Research Units. Before 2007, we used to know who the analyst was who was dealing with our claims, and we could engage with them. Now, we are not permitted to engage. We do not know who is reviewing our claims submissions, and there is no opportunity to deal at the staff level as claims are being processed. We have concerns about federal capacity to assess our claims. In some cases it appears that SCB staff are unfamiliar with basic factual issues related to the claims being submitted. This must affect their ability to assess incoming claims. But we are effectively prevented from engaging SCB to address any concerns we might have.

Overall during the past five years, SCB's withdrawal from meaningful engagement on claims submissions has created huge inefficiencies and distortions to the system. We do not believe this was the intent of the SCTA initiative.

File Closure / Tribunal.

We are concerned that SCB may be using file closure as a means to decrease its own inventory of Specific Claims. At the same time, there are barriers which effectively prevent First Nations from accessing the Tribunal, essentially removing their ability to appeal Canada's rejection of their claims. This is of grave concern.

Wolf Lake's experience is an example of how a First Nation has been effectively denied the ability to appeal a federal rejection of their claim. We have provided a detailed chronology of their claim for Reserve lands (see attachment #3). In summary, Wolf Lake spent five years in the Indian Claims Commission process but were unilaterally removed in the fall of 2007 by Canada and their Claims Commission file was closed. Wolf Lake was promised an "expedited process" by Indian Affairs, but delays in the establishment of the Tribunal meant that things have dragged on for years.

Once the Tribunal was finally established, Indian Affairs unilaterally made a policy decision to refuse funding for First Nations making their initial appeal to the Tribunal. This refusal is in our view entirely contrary to the objectives of the Justice at Last effort, and seems intended as a means to discourage First Nations from appealing their claims to the Tribunal.

Now, we see from the Tribunal's 2014 report that its very existence and independence are under threat. We wonder if Wolf Lake will ever have an opportunity to have their appeal heard, despite assurances from this government that they would.

In November 2007, WFLN was in a fully funded process which had the prospect of leading to resolution of it's claim. It had committed five years to that process, based on Canada's assurances of fair treatment and due process. Eight years later, despite the federal government's promise of an "expedited process" and a fair hearing, WLFN has no process, no funding to advance its claim, and to judge from the Tribunal's 2014 annual report, perhaps no forum in which to have its claim heard.

Whether or not it was intended, the practical effect of Canada's treatment of Wolf Lake claim since 2007 has been to effectively prevent Wolf Lake from having it's claim heard by an independent third party. This is, we believe, justice denied.

We remain very concerned that the federal government appears to be taking steps to reduce or eliminate the independence of the tribunal, and to hobble its operations. They are making a mockery of the Justice at Last initiative.

Negotiations

We are not in negotiations, but we hope to be there in time. We are concerned, however, about what we have heard regarding the conduct of negotiations under current circumstances. Many First Nations speak about apparent sharp dealing by federal negotiators. We would point to two decisions which provide clear details about federal behaviour at the negotiating table: *Mohawks of the Bay of Quinte and the Minister of Indian Affairs and Norther Development*, a decision of the federal court [2013 FC 699], and the Honourable Patrick Smith's SCT decision regarding AOK First Nation and Canada [2014 SCTC 1]. Both of these decisions highlight serious issues about the conduct of federal officials and Crown Ministers in claims negotiations.

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There is more that could be said but we are mindful of time constraints. Thank you for the chance to make this presentation.

Attachments

1. Map showing First Nations in the Ottawa River vicinity.

2. Timiskaming Specific Claims: Chronology and April 13, 2005 agreement between ANS and SCB

3. Wolf Lake Specific Claim: Chronology

4. Access to Federal Records

The Ottawa River Watershed and Aboriginal communities, showing the height of land

Height of Land: Southern boundary of Rupert's Land (HBCo Charter, 1670, Treaty of Utrecht, 1713) and Northern boundary of Quebec (Quebec Act, 1774 and Governor Guy Carleton's Commission, 27 December 1774). Line demarcated using NRCAN's Atlas of Canada 1:1,000,000 watershed boundaries.

N

Scale 1:2,000,000

0 15 30 60 90 120 Kilometres

Wahgoshig
Abitibiwinni
Matachewan
Lac Simon
Timiskaming
Long Point
Kitcisakik
Barriere Lake
Temagami
Wolf Lake (Hunter's Point)
Eagle Village
Wanapitei
Kitigan Zibi
Nipissing
Dokis
Pikwakanagan
Ottawa
Kanesatake (Lake of 2 Mountains)
Kahnawake
Akwesasne
Québec

Timmins
New Liskeard
Ville-Marie
Ft. Temiscamingue
Témiscaming
Sudbury
North Bay
Lake Nipissing
Mattawa
Deep River
Chalk River
Petawawa
South River
Georgian Bay
Orillia
Cornwall
Reservoir Gouin
Reservoir Cabonga
United States

Without prejudice and for discussion only. This map is provisional. Boundaries are based on the results of research to date and may change as additional materials are discovered. This map is not to be displayed, used, or reproduced without prior approval of the Algonquin Nation Secretariat.

Map prepared by PlanLab Ltd., for the Algonquin Nation Secretariat, March, 2014. RN 51367

Timiskaming First Nation Specific Claims Chronology, 1998-2008.

1998: The ANS begins Specific Claims Research for Timiskaming. Because of the complexity of the facts and the large number of transactions (almost 40 surrenders), it is agreed with Indian Affairs that the work will take a comprehensive approach: ie., gather baseline data on creation of the reserve, surveys, boundaries & surrenders; then draft up the findings & identify claims.

2002: ANS presents overall picture to Timiskaming First Nation and identifies key Specific Claims issues. The community identifies priorities for claims development.

2002-2005: ANS engages with TFN and Indian Affairs to begin to address claims and lands management issues. The parties agree that TFN's claims are extremely complex and will require long term commitment to resolve, including development of capacity on the federal side. SCB recommends that ANS enter into a cooperative research agreement to address these issues going forward. On April 13, 2005: SCB and the ANS sign an agreement, mandated by TFN BCR, to guide the research and development of Timiskaming Specific Claims. The objectives of this agreement:

> To expedite the research, development, submission and processing of Specific Claims on behalf of the Timiskaming First Nation;
>
> To develop appropriate mechanisms to facilitate a cooperative approach to research issues between the ANS and the SCB;
>
> To work to reach a shared understanding between the ANS, the TFN and the SCB as to the facts underlying the potential Specific Claims of the TFN.

The ANS provides SCB with a tentative list of claims and subsequent work plans are based on the expectation of joint review of claims as they are developed by the ANS.

2005-2007: ANS proceeds with its research & claims development on this basis.

December 2007 - January 2008: SCB unilaterally introduces changes to claims assessment and submission process (including introduction of the "Early Review Process"). SCB abrogates the Agreement of 13 April 2005 without consultation or discussion. SCB refuses to formally notify TFN or to indicate the authority by which the agreement was abrogated, and declines to engage ANS or TFN to develop alternative approach or mitigating strategies. SCB takes the position that the Agreement of 13 April 2005 is inconsistent with the draft SCTA bill and simply refuses to discuss.

2009-2012: The entire TFN Specific Claims workplan, timelines and research methodology are adjusted to take into account SCB's abrogation of the agreement. Years of work went in the wrong direction and need to be fixed. SCB refuses to participate in any discussion of mitigation or adjustment strategies. Funding unit blames ANS for resulting delays.

A COOPERATIVE APPROACH TO THE RESEARCH, DEVELOPMENT AND PROCESSING OF TIMISKAMING FIRST NATION SPECIFIC CLAIMS

TERMS OF REFERENCE

Whereas the Algonquin Nation Secretariat (ANS) carries out research and development of specific claims on behalf of the Timiskaming First Nation (TFN);

Whereas the Specific Claims Branch of the Department of Indian Affairs (SCB) is responsible for processing specific claims which have been submitted by claimants;

Whereas the specific claims for TFN are particularly complex, given the following factors: the history of the policy and management of Indian lands in the province of Quebec, including the application of the *Star Chrome* decision; the unique facts related to the creation of the Timiskaming reserve, including problems with the original surveys and establishment of the reserve boundaries; the multiplicity of surrenders; the lack of documentation contained in federal records; and the present day impacts of these complicating factors, including ongoing third party encroachments and a checker-board pattern of reserve and non-reserve lands;

Whereas the complexity of the TFN specific claims has resulted in these claims taking much longer to research and develop;

Whereas the SCB would like to see much quicker progress in the submission of TFN specific claims by ANS, but understands and acknowledges the reasons for the pace of the progress in this case;

Whereas with a view to assisting and supporting ANS in the research and development of TFN specific claims, while at the same time meeting its own expectations in terms of the submission of specific claims, the SCB has proposed a cooperative approach to the research, development and processing of TFN specific claims;

Whereas the ANS is prepared to work with the SCB in this cooperative approach upon certain terms and provided it does not prejudice the TFN in any way whatsoever, particularly with regard to the application of limitation/prescription periods or the doctrines of laches and acquiescence.

TERMS OF COOPERATION.

1. Objectives.

The objectives shall be as follows:

To expedite the research, development, submission and processing of Specific Claims on behalf of the Timiskaming First Nation;

To develop appropriate mechanisms to facilitate a cooperative approach to research issues between the ANS and the SCB;

To work to reach a shared understanding between the ANS, the TFN and the SCB as to the facts underlying the potential Specific Claims of the TFN.

2. Process.

As the ANS identifies a potential specific claim, at the direction of the TFN Council, it will prepare a short document outlining the allegations respecting the claim (claim allegations document), based on the terms of the Specific Claims policy, *Outstanding Business,* as amended.

These claim allegations documents, along with supporting documentation, shall be transmitted to the SCB representative, for submission review.

A list of potential Specific Claims is attached as Annex "A", which includes a number of claims that will be the subject of claims allegation documents in 2005-06.

Once the submission review has taken place, SCB staff shall communicate with ANS staff to discuss the claim allegations document and to work cooperatively on the development of a research plan to close any gaps that may exist.

The ANS shall be responsible for carrying out all supplementary and clarification research.

The ANS and SCB shall schedule regular meetings or teleconferences to review progress and address any issues which may arise in the course of the supplementary research. These meetings may also involve representatives of TFN Council as appropriate.

Once the research is complete and ANS and SCB have come to a shared understanding of the facts underlying the claim allegations document, the materials will be forwarded to TFN legal counsel for legal review and the development of legal submissions.

Formal submission of a finalized specific claim and legal submissions shall occur at the direction of TFN Council.

3. Policy.

Consistent with the public commitment made by then-Minister Robert Nault, Specific Claims submitted prior to the coming into force of the SCRA (Bill C-6) shall be dealt with pursuant to the Specific Claims policy, *Outstanding Business*, and associated processes. If, at a later date, the SCRA comes into force, the TFN will have the option of proceeding under the Specific Claims policy and associated processes, or the new SCRA.

4. Other matters.

The ANS shall maintain carriage and control of the research and development of TFN specific claims.

Claim allegations documents submitted to SCB pursuant to this cooperative approach shall be considered as ongoing files by SCB, TFN and ANS for the purposes of this process.

The SCB acknowledges that any claims allegation documents which shall be submitted are in draft form for the purposes of expediting consideration of potential Specific Claims and are not indicative of the ANS' ability to fully document these potential claims.

The submission of claim allegations documents shall not engage the start of any limitation/prescription period against the TFN.

This cooperative approach to research, development and submission of TFN Specific Claims shall take effect in fiscal year 2005-06 and will continue until the parties are agreed that the research is complete.

The claim allegations documents are submitted on a confidential basis on the understanding that neither the claim allegations document nor any supporting materials will be disclosed to any other party without the consent of the ANS and TFN.

Signed on April 13th, 2005, at Ottawa.

Nadia Bartolini,
A/Manager, Research,
Specific Claims Branch,
Indian & Northern Affairs Canada

Peter Di Gangi,
Director,
Algonquin Nation Secretariat

Wolf Lake First Nation: Claim for Reserve Lands, Post-1951: Chronology, 2002-2015

Jan 28 2002: formal request to enter ISCC process based on federal rejection of claim

Sept 26 2002: First planning conference with Canda, WLFN, ANS, ISCC. It is agreed to suspend the formal inquiry process to allow a chance for mediation. The parties agree upon the issues and what research is required. The work proceeds.

May 31 2004: Research completed and submitted to the parties

July 18 2006: Canada rejects revised claim

October 17 2006: WLFN requests resumption of formal inquiry process

2006-07: In discussions between the AFN and Canada, it is understood that, if new claims legislation comes into effect, First Nations at the ISCC will have the option of continuing their process, or entering the new process.

November 27 2007: Canada tables Bill C-30, Specific Claims Tribunal Act, in the House of Commons

November 22, 2007: Order in Council PC 2007-1789 is adopted which alters the mandate of the ISCC, shutting down many inquiries. This was done unilaterally without any consultation with claimants or the AFN.

November 20, 2007: ISCC writes to WLFN, indicating that according to PC 2007-1789, Canada has deemed WLFN's claim to be removed from their roster. No commitment as to how the claim would be dealt with and no assurances about addressing the claim.

Canada's unilateral decision was entirely unilateral and contrary to the understandings reached in the AFN-Canada process.

December 12, 2007: WLFN writes to Canada, expressing concern about unilateral removal from ISCC and no commitment re: process

Jan 30 2008: Canada confirms to WLFN that it's claim has been removed from ISCC and says that WLFN will have to wait until Bill C-30 becomes law, then be eligible for an "expedited process" to fast track the claim to the tribunal.

July 8 2007: Canada offers "expedited" process to WLFN but sets deadline of Jan 30 2009 or else the claim will be "closed". But INAC will not commit funds to enable the community to consider or make a decision. Efforts are made to secure funding commitment from INAC.

November 26, 2008: WLFN writes to SCB objecting to January deadline and highlighting the fact the INAC has not committed funds for WLFN to consider the federal offer. Subsequently funds are secured, and a decision is made to take up Canada's offer of an "expedited" process.

July 13 2009, July 17 2009: Canada informs WLFN that their claim for Reserve lands post-1951 is rejected again, which opens the door to proceed to the SCT. The problem is, there is no SCT in operation.

August 31, 2009: WLFN writes to Canada, explaining background and requesting firm date for opening of SCT operations and when can WLFN avail themselves of the "expedited" process. No meaningful response is received.

November 27, 2009: Canada finally appoints the first three members of the Tribunal

December 2009: Taking matters into its own hands to try and advance its claim, WLFN deposits all records with the Registrar of the SCT, but there are not yet any rules of procedure, so it's in limbo.

June 22, 2011: The SCT's Rules of Procedure are published and come into force.

2011: Indian Affairs unilaterally decides that funding will not be provided to First Nation to file their claims with the SCT in the first instance. No funds to prepare formal submission to SCT

2014: The SCT submits its annual report which reads, in part:

> The Tribunal has neither a sufficient number of members to address its present and future case load in a timely manner, if at all. Nor is it, due to the imminent coming into force of section 376 of the Economic Action Plan 2014 Act, No. 1, which provides for the creation of the Administrative Tribunal Support Services Canada (ATSSC), assured of its ability to continue to function with adequate protection of its independence. These concerns have been raised with the Minister of Justice and the Minister of Aboriginal Affairs and Northern Development. There has been no adequate response from Government.

Attachment #4.
Access to Federal Records

Since 2008 we have seen a dramatic deterioration in federal capacity related to the retention of records, and our ability to access those records. Since the federal government has primary legislative responsibility for Indian Affairs, federal records are key in terms of documenting our rights and claims. This is a becoming an increasingly large barrier to documenting our rights and claims.

Library and Archives Canada (LAC) is supposed to be the custodian of federal records. However severe cuts at LAC in the past seven years have eliminated many positions and there are now few if any archivists who have any knowledge of the records they are working with. Access to records, and to staff, is now rationed. LAC's supposed "strategy" to digitize its records was ill-conceived and has been an abject failure by all accounts. More troubling, we have heard in that in the case of at least one federal department, LAC has refused to accept records, leading to their destruction.

At AANDC and other federal departments, access to federal records has become more difficult as well. There has been a clear "freezing up" of the federal government's willingness to allow access to its records - even those that relate directly to the interests of our communities. It is not unusual to wait three or six months for records and even then significant items may have been removed based on a liberal reading of the allowable exemptions. This leads to appeals and interaction with the Office of the Information Commissioner, whose budget and capacity has also been cut severely by this government.

The end result of these things is that it is getting increasingly difficult, and costly, to obtain records held by the federal government. These are records that relate directly to our communities, and which provide the evidence for federal breaches of its treaty, legislative, and fiduciary duties.